

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for approval of delivery services tariffs and	:	Docket No. 01-0423
tariff revisions and of residential delivery services	:	
implementation plan, and for approval of certain	:	
other amendments and additions to its rates, terms,	:	
and conditions	:	

**COMED’S REQUEST FOR  
CONFIDENTIAL TREATMENT OF DOCUMENTS  
AND DATA REQUEST RESPONSES THAT ARE THE SUBJECT  
OF THE GOVERNMENTAL AND CONSUMER PARTIES’ OBJECTIONS**

Commonwealth Edison Company (“ComEd”), by its attorneys, and pursuant to the Notice of Hearings and Notice of Administrative Law Judges’ Ruling dated August 30, 2001 (the “Notice”), respectfully moves the Administrative Law Judges (the “ALJ’s”) to approve designation of the data request responses and documents referred to in this Request as Confidential or Confidential and Proprietary as requested by ComEd pursuant to the Protective Order that is in place in this proceeding, as amended. The confidential status of the materials that are the subject of this Request has been objected to by the Citizens Utility Board, the Illinois Attorney General’s Office (the “AG”), the People of Cook County, and the City of Chicago (collectively, the “Governmental and Consumer Parties” or “GCI”). In response to the objections, and in accordance with the procedures set forth in the Notice, ComEd hereby moves the ALJ’s to designate the materials that are discussed in this Request as Confidential or Confidential and Proprietary under the Protective Order, and to deny the objections that GCI has raised.

**INTRODUCTION**

The documents and data requests responses that are the subject of the GCI's objections should be designated as Confidential or Confidential and Proprietary under the Protective Order. ComEd has been very selective in making such designations and further, ComEd seeks to designate only a relatively small portion of the materials at issue under the latter category out of the total of 10,670 pages of material produced to date. The materials at issue reflect certain sensitive information that is at the heart of ComEd's business operations. The materials include ComEd's current business plans and minutes and summaries of ComEd Board of Directors meetings during which sensitive matters impacting ComEd were discussed. The materials also include important financial materials, including budgets and projections relating to ComEd's transmission and distribution operations as well as sensitive pricing information relating to materials and services purchased by ComEd from third parties. Making such information public is inappropriate and could increase ComEd's costs of providing service by hampering its ability to negotiate lower prices from third party vendors and suppliers. ComEd also has designated certain documents that reflect the electric use of individual customers as confidential. The confidential treatment of these materials is necessary if the legitimate business interests of ComEd and these third parties are to be preserved.

It should be noted that ComEd does not object to the production of the materials that are the subject of this Request to GCI. ComEd has either produced these materials to GCI or is in the process of producing them at this time (without waiving ComEd's right to make confidentiality designations). ComEd requests only that these materials receive confidential treatment by GCI and the other parties to this proceeding. This designation will, pursuant to the terms of the Protective Order, provide GCI and other parties who have signed the Protective Order with the ability to use these materials for the purposes of this case. It will only prevent

these parties from distributing ComEd's materials to third parties or to the public, and from using them for purposes unrelated to this case, such as, in some instances, to further their own business interests. These restrictions that are placed on the use of these materials under the Protective Order will not impair the ability of GCI or any other parties to litigate this matter and, in light of the sensitivity of these materials, are well-justified.

The Illinois Public Utilities Act, 220 ILCS 5/1-101 et seq. (the "Act"), the Commission's Rules of Practice, and the Illinois Supreme Court Rules all contemplate that confidential information may be exchanged in connection with the discovery process, and that the confidentiality of such information is properly maintained by protective orders like the one that has been entered in this case. The materials that are the subject of this Request contain confidential business information that is routinely made subject to protective orders consistent with the Act and with Commission and Supreme Court Rules in order to protect the business interests of the parties involved.

GCI has advanced no legitimate reason the materials that are the subject of this Request should not be afforded confidential treatment. While ComEd has been selective in making confidentiality designations, GCI essentially has not been selective in making objections. GCI's blanket assertion that no ComEd materials should be afforded confidential treatment is incorrect, has never been accepted by the Commission, and should not be accepted in this case. As discussed below, the Commission has entered protective orders in dockets involving ComEd. GCI advances no other valid reason why confidential treatment should not be provided to these materials that are the subject of this Request. GCI's objections to the confidential designation of these materials should therefore be denied and the ALJ's should grant ComEd's request for confidential treatment of the materials referred to herein.

## **ARGUMENT**

As the ALJ's are aware, the Act, the Commission's Rules, and the Supreme Court Rules each provide for the protection of confidential information exchanged during discovery. The Act expressly provides that the Commission "shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity." 220 ILCS 5/4-404. The Commission has complied with this provision through Section 200.430 of the Rules of Practice, which states that:

At any time during the pending of a proceeding, the Commission or the Hearing Examiner may. . . enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies.

83 Ill. Admin. Code § 200.430.

Section 200.430 of the Commission's Rules is similar to the Illinois Supreme Court Rule 201(c), which provides for the entry of protective orders in civil litigation. It states:

The Court may at any time make a protective order as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable expense, embarrassment, disadvantage, or oppression.

Ill. Sup. Ct. Rule 201(c). The Illinois courts have recognized in applying Rule 201(c) that there is "ample precedent" for the entry of a protective order "preventing the dissemination of sensitive discoverable materials to third parties or for purposes unrelated to the lawsuit." May Centers, Inc. v. S.G. Adams Printing and Stationery Co., 153 Ill. App. 3d 1018, 1021, 506 N.E. 2d 691, 694 (5th Dist. 1987). The decision to enter such a protective order that would prevent the dissemination of discoverable materials rests with the trial court, or, in this case, with the ALJ's. Skolnick v. Alzheimer & Gray, 191 Ill. 2d 214, 224, 730 N.E.2d 4, 13 (2000).

The materials discussed in this Request consist of confidential business information that is recognized as properly subject to protective orders in Illinois and, indeed, elsewhere. Accordingly, this information should be afforded confidential treatment in this case.

**GCI's Claim That None of  
ComEd's Materials Should be  
Afforded Confidential Treatment Is Incorrect**

GCI initially claims that none of ComEd's materials that are the subject of its objections are entitled to confidential treatment. GCI argues that because these materials involve ComEd's "jurisdictional intrastate transmission and distribution delivery services" over which ComEd has a "monopoly", there are "no matters of competitive sensitivity likely to be at issue" in them. (GCI Objection, p. 2). GCI thus claims that the documents are "public information by law" and that they do not "merit any confidentiality protections." (GCI Objection, p. 3). That is nonsense.

GCI's contention that ComEd's business documents should not receive confidential treatment is contrary to the plain language of Section 4-404 of the Act, which states that the Commission "shall provide adequate protection for confidential and proprietary information furnished . . . by any person, corporation or other entity . . . ." 220 ILCS 5/4-404 (emphasis added). The protections that are required pursuant to Section 4-404 extend to "any" corporation or entity, and do not exclude utilities in the same position as ComEd. The legislature could have easily limited the protections afforded by this section to exclude utility interests (subject to legal constraints), but chose not to do so. As such, GCI's claim that ComEd's materials should not receive confidential treatment are contrary to the express language of Section 4-404 and the intent of the legislature in drafting that section, and therefore should not be accepted.

GCI's position that ComEd's business documents should not receive confidential treatment also has never been accepted at the Commission. The Commission has entered protective orders in ComEd proceedings to protect the commercial sensitivity of ComEd's business information. For example, the Commission entered a protective order in ComEd's first delivery services rate case, Docket No. 99-0117, that is similar to the Protective Order in place here, except that the current Order has been updated as to electronic documents and revised by the ALJ's.

GCI's airy claim that ComEd's documents are not "likely" to contain commercially sensitive materials simply misses the mark. ComEd's materials, as discussed in detail below, have been designated as confidential by ComEd because of the commercially sensitive information they contain. For example, these materials include ComEd's business plans and documents that summarize the meetings of ComEd's Board of Directors. As such, they reflect ComEd's current strategic policies on a number of issues. The materials that are the subject of this Request also include ComEd's financial documents, such as the budgets for its transmission and distribution systems. Financial materials of this type have traditionally been afforded confidential treatment at the Commission.

In fact, the Commission, in a recent order recognized that ComEd has legitimate concerns in protecting the confidentiality of its business records. In In Re Amendment of 83 Ill. Admin. Code 200, ICC Docket No. 00-0353, 2000 Ill. PUC LEXIS 677 (Order August 29, 2000), the Commission considered various amendments to Section 200.430 of its Rules of Practice concerning protective orders. In response to a proposed amendment, ComEd raised concerns that the amendment would place a specific time limit on the confidentiality protections that a protective order entered at the Commission would provide. In response to ComEd's

concerns, the Commission modified the proposed amendment to Section 200.430. In Re Amendment of 83 Ill. Admin. Code 200, 2000 Ill. PUC LEXIS 677 at \* 23. In doing so, the Commission recognized that ComEd has a legitimate interest in protecting its business information at the Commission through protective orders, and that its documents are not “public information” as GCI contends.

In sum, the Commission has never accepted GCI’s claim that ComEd’s business records should be treated as “public information” and not afforded confidential treatment. GCI’s claim, as stated above, is contrary to the express language of the Act and the accepted practice at the Commission, as well as common sense, and therefore should not be accepted here.

**The ALJ’s Should Designate The Materials That Are The Subject Of This Request As Entitled To Confidential Treatment Under The Protective Order**

The Notice states that ComEd is to provide the ALJ’s with its “rationale” as to why the documents and the data request responses that the subject of GCI’s objections should be designated as Confidential or Confidential and Proprietary under the Protective Order. The rationale for each of these items is set forth below. The materials that are the subject of this Request fall, for the most part, within several categories, each of which involves ComEd’s confidential business operations and are entitled to confidential treatment under Illinois law. The documents at issue are being addressed here by category.<sup>1</sup>

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<sup>1</sup> The Notice provides that ComEd is to provide the ALJ’s with a copy of the “data requests complained of in the GCI objection” in connection with this Request. Those requests and the responses thereto were already provided as Exhibit 3 to the GCI objection itself. Copies of the documents that are the subject of the GCI objections will be provided to the ALJ’s with this Request.

**1. ComEd's Budget and Financial  
Information Is Entitled To Confidential Treatment**

A substantial amount of the materials that are the subject of GCI's objections involve ComEd budgets for the operation of its transmission and distribution systems. These materials are those sought in the following GCI data requests:

- AG data requests 1.03 and 1.04, which seek, in relevant part, ComEd's "budgeted" capital and operating and maintenance expenditures on its distribution system for each year since 1990;
- AG data requests 1.14 and 1.15 which seek ComEd's "budgeted or projected" capital and operating and maintenance expenditures for its distribution system for the years 2001 – 2005;
- AG data requests 1.18 and 1.19 which seek "budget documents" for ComEd's distribution system capital and operating and maintenance budgets;
- AG data requests 1.22 and 1.23 which seek reports that "reconcile and/or explain the reasons for variances between budgeted and actual" distribution system capital and operating and maintenance expenditures.

GCI's objections also extend to ComEd documents that have been designated as AG 55-56 and AG 1394-1423. These documents have already been produced in response to these data requests and contain ComEd's confidential budget information.<sup>2</sup>

As an initial matter, ComEd has not designated all of the budget information called for by these requests for confidential treatment under the Protective Order. This is reflected in ComEd's responses to several of these data requests which state that the responsive documents "may" be confidential. (See responses to AG data requests 1.18 and 1.19). In these responses, ComEd has reserved the ability to designate certain responsive materials as

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<sup>2</sup> GCI objects to ComEd's response to AG data request 1.01. However, no confidentiality objection was asserted in response to that data request. (See ComEd Response to AG data request 1.01, a copy of which is attached to the GCI Objection as Ex. 3 at AG 1-4).



confidential where necessary. ComEd has not, however, designated all responsive materials as confidential as a general matter.

ComEd's budget information that has been designated as confidential includes budgets that have not yet been spent. As discussed below, designating this information as confidential is necessary to preserve ComEd's business position with respect to the expenses incurred in connection with the operation of its distribution system. ComEd has not, however, designated historical budgets as confidential because these concerns are no longer at issue with respect to historical information. For similar reasons, ComEd has designated budget information (including certain historical information) as confidential where it could be used by specific vendors in connection with determining amounts they can charge to ComEd. Making such information public could increase ComEd's costs of providing service.

These confidentiality designations that have been made by ComEd are reasonable. If certain of ComEd's budgets for the operation of its distribution system were to become publicly available (as GCI requests), ComEd's bargaining position with some vendors and suppliers with whom ComEd has business arrangements could be irretrievably compromised. Knowledge of specific aspects of ComEd's budgets would allow some of these parties to identify the amount that ComEd has allocated for some specific work, and would thus impact ComEd's ability to effectively negotiate with these parties in connection with arrangements for system work and materials.

Moreover, as discussed in ComEd's responses to the data requests listed above, ComEd's budget information for the relevant time periods was not separated between distribution and transmission budgets, and, as a result, materials produced in response to these requests will also include transmission budget information. The value of ComEd's transmission

system -- which is reflected in these materials -- is an important piece of confidential information in light of possible developments relating to the Alliance Regional Transmission Organization. This budget information therefore is commercially sensitive.

Financial information – such as the ComEd budget information at issue here – is the type of information that the Illinois courts have considered as appropriately protected by a protective order. For example, May Centers, Inc. v. S.G. Adams Printing and Stationery Co., 153 Ill. App. 3d 1018, 506 N.E.2d 691 (5th Dist. 1987), involved the question of whether agreements that allocated the common area expenses amongst shopping center tenants should be designated as confidential under a protective order. The court held that such designation was appropriate because, among other reasons, dissemination of the terms of the agreements -- including the pricing terms therein -- could impact the shopping center owner's bargaining position with tenants who were not parties to the case. May Centers, 153 Ill. App. 3d at 1022-23, 506 N.E.2d at 695. Put more directly, one Illinois court has noted that the United States Supreme Court has held that protective orders are appropriately used to prevent dissemination of materials "dealing with the financial affairs of a litigant." Cummings v. Beaton & Associates, Inc., 192 Ill. App. 2d 792, 798 n.2, 549 N.E.2d 634 (4th Dist. 1984) (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)).

In sum, the ComEd budget information sought by GCI is the type of financial information that courts have commonly found is appropriately protected from dissemination through a protective order. The confidential treatment of this information is necessary to protect ComEd's legitimate business interests that are identified above. GCI's objections to the confidential designation of these materials should therefore be denied.

**2. ComEd Is Entitled To Confidential Treatment Of Its Business Plans And Materials Submitted To Its Board Of Directors And Senior Management**

A number of data requests that are the subject of GCI's objections seek the production of ComEd's business plans and materials relating to ComEd's Board of Directors and Senior Management that concern the issues involved in this proceeding. These requests include:

- AG data request 1.27 that seeks ComEd's "two most recent business plans";
- AG data requests 1.28 and 1.29, that seek "notes minutes and summaries" of meetings of ComEd Board's of Directors and Senior Management since January 1, 1998, during which "distribution improvement programs" were discussed;
- Cook County data request 2.151, which seeks, among other things, presentations to ComEd's Board of Directors concerning specified investment decisions.

These materials should receive confidential treatment for obvious reasons.

Initially, ComEd's business plans certainly require confidential treatment because they reflect ComEd's strategic planning for its business operations at the present time. ComEd has agreed, in its response to AG data request 1.27, to produce portions of these plans that "relate to distribution costs and investments in the test year or in 2001, or that discuss the prudence of any cost included in the revenue requirement." (ComEd's Response to AG Data Request 1.27 which has been Bates labeled as AG 000032, and which is attached to the GCI Objection at Ex. 3). ComEd's investment planning referred to its business plans requires confidential treatment to protect ComEd's business interests. As with the budget information referred to above, this information could be used to ComEd's detriment if obtained by ComEd's vendors, suppliers and other parties with ComEd has business arrangements in connection with its distribution system. These parties would undeniably gain an unfair advantage over ComEd if they were aware of ComEd's business strategies and objectives and, as a result, ComEd would be harmed if its

business plans were distributed. In contrast, GCI has advanced no valid reason these plans should be publicly available.

ComEd's materials relating to the meetings of its Board of Directors and its senior management are also entitled to confidential treatment. These materials reflect the deliberations of ComEd's highest ranking officers and, indeed, of its Board itself, on matters that are critical to ComEd's business operations. ComEd's Board members and senior management should have assurance that they can freely discuss matters without the content of their discussions becoming public information. Moreover, outdated financial information presented to the Board could be misleading if publicly disclosed, thereby triggering ComEd's obligation to make additional disclosures to investors. Topics in these Board materials are also subject of pending litigation. These factors all indicate that these materials should be designated as confidential. In contrast, GCI has failed to designate any interest that would be advanced if these documents were to be made publicly available.

ComEd has not objected to the discovery of materials relating to its Board or its senior management that concern issues that are relevant to this case. ComEd has provided these materials to the GCI or is in the process of providing them. ComEd only requests that these documents be treated confidentially for the purposes of this proceeding. This request is reasonable for the reasons that are stated above and the ALJ's should therefore designate these materials as confidential under the Protective Order.

### **3. ComEd Is Entitled To Confidential Treatment Of Studies And Evaluations Relating To Its Distribution System**

A number of GCI data requests seek studies and evaluations concerning ComEd's operations, including the operation of its distribution system. These requests include:

- AG data request 1.02 which seeks ComEd customer load forecasts;

- AG data request 1.10 which asks for studies and analyses comparing the reliability of ComEd's distribution system to that of other companies;
- AG data request 1.13 which seeks documents relating to ComEd distribution system improvement programs;
- AG data request 1.26 which seeks ComEd distribution system planning studies;
- AG data request 1.30 which seeks certain "assessments or evaluations" of ComEd's distribution system prepared by or for ComEd witness DeCampli;
- AG data request 1.34 which seeks certain "assessments, evaluations or studies" concerning the need "to replace or upgrade equipment that is already in service."

ComEd has also produced documents that were designated as AG 0001094 – 1101, AG 0001171, AG 0001367 - 1371, AG 0001383 – 1385, AG 0001388 – 0001393 in response to these data requests. These documents were designated as confidential by ComEd when produced and GCI objects to this designation.

As with the budget information discussed above, ComEd has not designated all of the materials called for in the requests listed above as confidential, and instead has designated only certain materials in this manner. For example, ComEd has designated diagrams showing the configuration of its distribution system as confidential for significant security reasons that are discussed below. ComEd has also designated materials as confidential if they show pricing information of third parties who provide (or who seek to provide) materials or services to ComEd in connection with the distribution system or if they would assist vendors in connection with their business dealings with ComEd. Finally, ComEd has designated certain documents that reflect the electric use of individual customers as confidential.

These confidentiality designations are reasonable. For example, the diagrams of the distribution system that are called for by these requests must be treated confidentially for

security reasons. These materials could be used to sabotage ComEd's electric system by showing what steps are necessary to disable significant portions of the system. Documents that contain third party pricing information or that reflect the electric use of individual customers also should be kept confidential to maintain the legitimate business interests of these parties. And finally, documents that could assist ComEd's vendors in negotiations with ComEd should be kept confidential for the same reasons that are stated above in connection with ComEd's budget information.

**4. ComEd is Entitled to Confidential Treatment of the Remaining Materials that are the Subject of GCI's Objections**

Finally, ComEd is entitled to confidential treatment of the remaining materials that are the subject of GCI's objections. GCI objects to ComEd's designation of the actuarial studies referred to in COC data requests 1.010 and 1.011. These studies are properly designated as confidential because they were prepared at considerable expense by ComEd. ComEd is entitled to the confidential treatment of these materials that constitute its proprietary information.

ComEd is also entitled to confidential treatment as to COC data request 2.138(a), which seeks information concerning the load that is on the PPO. ComEd's response to ARES data request 7.12 indicated the amount of demand on ComEd's PPO. However, the amount of load served by RESs under PPO assignment is commercially sensitive confidential information of RESs and ComEd objects to being asked to produce such. As to COC data request 2.138(b), ComEd directs the City to ComEd's response to ARES data request 1.2, which contains parallel information as to a later date and which ComEd has not designated confidential.

Finally, ComEd has redacted information from the document identified as AG 1552 which identified specific customers. This was done to protect the confidentiality of this

customer information. Document AG 1509 was redacted because the information contained therein was protected by the attorney-client privilege.

### **CONCLUSION**

WHEREFORE, for all of the reasons stated in this Request, ComEd respectfully requests that the Administrative Law Judges designate the materials discussed in this Request as Confidential or Confidential and Proprietary under the Protective Order. ComEd therefore also requests that GCI's objections to the confidential treatment of these documents be denied.

Dated: September 5, 2001

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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